Supreme Court, U. S.
FILED
JUL 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC., *Appellant*,
v.
COMMONWEALTH OF VIRGINIA, *Appellee*.

On Appeal from the Supreme Court of Virginia

BRIEF OF THE WASHINGTON POST COMPANY, CBS INC., NATIONAL BROADCASTING COMPANY, INC., DOW JONES & COMPANY, INC., THE NEW YORK TIMES COMPANY, FIELD ENTERPRISES, INC., NEWSDAY, INC., THE GLOBE NEWSPAPER COMPANY, PHILADELPHIA NEWSPAPERS, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE PULITZER PUBLISHING COMPANY, MINNEAPOLIS STAR AND TRIBUNE COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, THE COPLEY PRESS, INC., TENNESSEAN NEWSPAPERS, INC., THE FREE LANCE-STAR PUBLISHING CO., AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, AMICI CURIAE, IN SUPPORT OF REVERSAL

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Fifteen newspaper publishers, two broadcast companies, and a professional association of newspaper editors submit this brief as *amici curiae* in support of

appellant's claim that the judgment of the Supreme Court of Virginia, entered on March 4, 1977, should be reversed. Both parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk, and are appended to this brief.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia, dated March 4, 1977, is set forth in the Appendix to the Jurisdictional Statement (hereinafter "J.S. Appendix") at page 1a and is reported at 217 Va. 699. The order of the trial court dated January 15, 1976, finding Landmark Communications (hereinafter "Landmark") guilty as charged and imposing a fine of $500, is set forth in the J.S. Appendix at page 21a and is unreported.

JURISDICTION

The decision of the Supreme Court of Virginia affirming Landmark's criminal conviction and rejecting its constitutional arguments was issued on March 4, 1977. A Notice of Appeal was filed on April 15, 1977, and this Court noted probable jurisdiction on June 13, 1977.

Jurisdiction of this Court to review the decision of the Supreme Court of Virginia is conferred by 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

> "The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.
>
> "If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.
>
> "Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.

> "If the Supreme Court after hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia establish and provide the rules for the Virginia Judicial Inquiry and Review Commission.[1] Section 2.1-37.13 provides, in relevant part:

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11 ["Order compelling witness to attend and testify"], 2.1-37.12 ["Depositions"]), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . .
>
> "All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.
>
> "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

The term "divulge" is not defined in the Virginia Code.

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[1] The complete text of the Virginia statute relating to the Commission is set forth in J. S. Appendix at pp. 22a-30a.

Pursuant to Virginia Code § 18.2-11(a), a misdemeanor may be punished by imprisonment for up to 1 year and a fine of up to $1,000.

QUESTIONS PRESENTED

(1) May a newspaper, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions for its publication of truthful statements concerning a public official in connection with his public duties?

(2) Assuming *arguendo* that a newspaper may ever be convicted and subject to criminal sanctions for such conduct, may it, consistently with the First and Fourteenth Amendments to the United States Constitution, be convicted and subjected to criminal sanctions under Virginia Code § 2.1-37.13 in the absence of factual proof adduced in evidence proving beyond a reasonable doubt that its publication of a truthful report concerning the investigation of a named judge by a state judicial commission constituted a clear and present danger to the administration of justice?

(3) Is Virginia Code § 2.1-37.13, as interpreted by the Supreme Court of Virginia, unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

INTEREST OF THE AMICI

Amici are fifteen publishers of general circulation newspapers, two broadcasting companies, and the American Society of Newspaper Editors. They fre-

quently report to the public on the affairs of government, including matters involving the judiciary. *Amici* represent a broad spectrum of the American newspaper publishing and broadcasting industry. They are located in cities and towns in states as diverse as New York, Iowa, Kentucky, Tennessee, Illinois, and Virginia, among others. They are diverse in size—their newspapers have circulations ranging from over one million daily to under 25,000 daily, and the two broadcasting companies have in excess of 30 million viewers for their nightly news shows.

The Washington Post Company and its subsidiaries publish The Washington Post (cir. 530,031), The Trenton Times (cir. 72,787) and Newsweek (weekly cir. 2,900,000) and own and operate television and radio stations.

CBS Inc. operates national television and radio networks, and owns and operates television and radio stations.

National Broadcasting Company, Inc. operates national television and radio networks, and owns and operates television and radio stations.

Dow Jones & Company, Inc. publishes, *inter alia,* The Wall Street Journal (cir. 1,407,985) and, through its subsidiary, Ottaway Newspapers, Inc., 14 daily newspapers in various parts of the country (combined cir. 373,993).

The New York Times Company publishes The New York Times (cir. 803,123).

Field Enterprises, Inc. publishes the Chicago Sun-Times (cir. 566,127) and the Chicago Daily News (cir. 358,550).

Newsday, Inc. publishes Newsday (cir. 466,635).

The Globe Newspaper Company publishes The Boston Globe (cir. 461,960).

Philadelphia Newspapers, Inc. publishes The Philadelphia Inquirer (cir. 421,627).

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes The Miami Herald (cir. 404,101).

The Pulitzer Publishing Company publishes The St. Louis Post-Dispatch (cir. 263,944), The (Tucson) Arizona Daily Star (cir. 60,442), and The Arizona Sunday Star (cir. 110,970).

Minneapolis Star and Tribune Company publishes The Minneapolis Star (cir. 235,361), Minneapolis Tribune (cir. 224,412), and Minneapolis (Sunday) Tribune (cir. 610,408).

Des Moines Register and Tribune Company publishes The Des Moines Register (cir. 224,094), Des Moines Sunday Register (cir. 425,161), Des Moines Tribune (cir. 91,736), and the Jackson (Tenn.) Sun (cir. 31,315).

The Courier-Journal and Louisville Times Company publishes The Courier-Journal (cir. 208,150), The Louisville Times (cir. 161,681), and The Courier-Journal & Times (Sunday cir. 345,052).

The Copley Press, Inc. publishes The San Diego Union (cir. 182,700) and San Diego Tribune (cir. 125,579).

Tennessean Newspapers, Inc. publishes The (Nashville) Tennessean (cir. 127,537).

The Free Lance-Star Publishing Co. of Fredericksburg, Va. publishes The Free Lance-Star (cir. 23,972).

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

All these *amici* would be adversely affected in their capacity to report the news to the American public if the decision of the Supreme Court of Virginia were permitted to stand.

STATEMENT OF THE CASE

The Virginian-Pilot, a Landmark newspaper, published an article on October 4, 1975, accurately describing a probe by the Virginia Judicial Inquiry and Review Commission [hereinafter "the Commission"] into the activities of a certain judge, who was identified in the article. The paper reported that "[n]o formal complaint has been filed by the Commission" against the judge, "indicating either that the five-man panel found insufficient cause for action or that the case is still under review." J. S. Appendix at p. 31a.

On November 5, 1975, Landmark was indicted by a Grand Jury of the Circuit Court of the City of Norfolk for its publication of the October 4th article. The Grand Jury charged that Landmark violated Virginia Code § 2.1-37.13 by "unlawfully divulg[ing] the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing" by the Commission.

Landmark moved to dismiss the indictment on the grounds that Virginia Code §2.1-37.13 did not apply to its publication, and could not be applied to its publication consistently with the First Amendment to the United States Constitution. Landmark's motion to dismiss the indictment was denied, and trial was held on December 10, 1975. Other than the charter, articles of amendment, and last annual report of Landmark, the only evidence against Landmark was a Stipulation which stated that *The Virginian-Pilot* was published by Landmark, a Virginia corporation; that an October 4, 1975 article published by Landmark identified a judge who had been the subject of an inquiry by the Commission; and that the Supreme Court of the Commonwealth of Virginia had not received a formal complaint from the Commission regarding the judge at the time the article was published. J.S. Appendix at p. 3a; 217 Va. at 701.[1]

The only witness at the trial, Mr. Joseph W. Dunn, Jr., Managing Editor of *The Virginian-Pilot*, testified on behalf of Landmark. Mr. Dunn testified that he decided to publish the article at issue because (1) a complaint had been filed against the judge some months before the Commission hearing; and (2) the news was of public importance. He acknowledged his understanding that revelation of information concerning Commission proceedings by an individual who had participated in those proceedings was a misdemeanor.

[1] Filing of a complaint with the Supreme Court of Virginia is significant in that the record then loses its confidential character. J. S. Appendix at pp. 4a-5a, 19a; 217 Va. at 702, 712.

But he stated that he did not believe that the statute applied to press reports of Commission proceedings. Mr. Dunn also testified that no reporter, employee, or agent of Landmark had participated in the Commission proceedings either under subpoena or otherwise.

Landmark was found guilty as charged on January 15, 1976. Fine was set at $500, and Landmark was ordered to pay the prosecution costs.[3] The order of the trial court made no mention of the constitutional and statutory arguments raised by Landmark.

The Supreme Court of Virginia upheld the Circuit Court decision by a 6-1 vote. The Court held that the statute was "clearly" applicable to Landmark and rejected Landmark's constitutional claims on the ground that there had been a "clear and well-defined legislative declaration" that such publication was "so contrary to the public interest" that it warranted criminal sanctions. J. S. Appendix at p. 14a; 217 Va. at 709. The Court concluded that the publication of information concerning the Commission would in every case be punishable as an "imminent and substantial threat to the orderly administration of justice," and that "courtroom evidence is unnecessary" to prove the particular publication's forbidden impact. J. S. Appendix at p. 15a; 217 Va. at 710. This determination was itself based on the Court's observation that the confidentiality of Commission proceedings serves three interests: it

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confi-

[3] Disclosure in violation of Virginia Code § 2.1-37.13 is a misdemeanor punishable by fine of up to $1000 and imprisonment for up to one year for each offense.

> dence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." J. S. Appendix at p. 18a; 217 Va. at 712.

In his dissent, Justice Poff concluded that the statute "should be construed not to apply [to Landmark] in these circumstances," for unless the statute is so construed it "offends the First Amendment." J. S. Appendix at p. 19a; 217 Va. at 713.

A Notice of Appeal was filed by Landmark on April 15, 1977, and this Court noted probable jurisdiction on June 13, 1977.

Since the decision of the Supreme Court of Virginia in this case, two federal court judges have questioned the constitutionality of Virginia Code § 2.1-37.13 as applied to the press. On March 15, 1977, Judge Robert R. Merhige, Jr., of the United States District Court for the Eastern District of Virginia, issued a temporary injunction prohibiting prosecution of a Virginia television station under Virginia Code § 2.1-37.13 for broadcasting information relating to a pending Commission investigation. J. S. Appendix at p. 32a. That order subsequently expired by its own terms since litigation was not pressed.

On March 31, 1977 Richmond Newspapers, Inc. was indicted for two violations of Virginia Code § 2.1-37.13, and on April 29, 1977 was convicted and fined $1,000 for each violation.[4] Subsequently, Judge D.

[4] On April 5, 1977, the U.S. District Court for the Eastern District of Virginia, per Warriner, J., denied an application by Rich-

Dortch Warriner of the United States District Court for the Eastern District of Virginia entered a temporary restraining order and then a preliminary injunction prohibiting further criminal prosecutions against Richmond Newspapers, Inc. under Virginia Code § 2.1-37.13.[5] In support of the restraining order, Judge Warriner observed that Virginia Code § 2.1-37.13 prohibited publication of information that "a self-governing Commonwealth needs," and that "there is a grave question as to the constitutionality of this statute." Appendix to Supplemental Brief of Landmark at p. 5a. The preliminary injunction remains in effect at this time.

SUMMARY OF ARGUMENT

I.

The Commonwealth of Virginia has made it a crime for the press[6] to publish the truth about disciplinary proceedings against state judges. In doing so, the Com-

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mond Newspapers, Inc. for a temporary restraining order prohibiting prosecution. At that time Judge Warriner stated that although he believed the statute was unconstitutional, he could not hold that the statute was "patently and flagrantly unconstitutional" in view of the decision of the Supreme Court of Virginia, and thus could not enjoin the criminal prosecution. *Norfolk Ledger-Star*, April 6, 1977, p. A8.

[5] A temporary restraining order enjoining further prosecution of Richmond Newspapers, Inc. under Virginia Code § 2.1-37.13 for a ten day period was entered on May 3, 1977. On May 12, 1977, the order was extended until May 21, 1977. On May 20, 1977, a preliminary injunction was entered. Appendix to Supplemental Brief of Landmark at pp. 1a, 8a, 10a.

[6] We use the terms "press" and "publication" in this brief as terms of art that encompass "broadcasts" by the "electronic media."

monwealth seeks to deny the most basic principles underlying the command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Those principles require that the dissemination of truthful facts concerning the affairs of government be protected.

Without accurate information about the operation of government, the issues with which government is concerned, and the stewardship of public officials, the people—the ultimate sovereigns—would be unable effectively and intelligently to govern themselves. Through the First Amendment, the Framers provided the vehicle for ensuring an informed citizenry, and selected the press to play a special role in that undertaking.

This Court has consistently recognized that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). The principle is central to the line of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and was reiterated in the Court's recent commercial speech decisions. These cases firmly establish the proposition that the government may not prevent the free flow of truthful information on the paternalistic ground that the citizenry is better off left in ignorance.

II.

Assuming *arguendo* that the state may under some circumstances impose criminal sanctions on the press for accurately reporting governmental affairs, the interests advanced by the Commonwealth of Virginia are wholly inadequate to sustain the imposition of sanctions pursuant to Virginia Code § 2.1-37.13.

The first interest advanced by the Commonwealth—protecting the reputation of individual judges—is not effectively promoted by the statute. The statute does not prevent anyone from publishing charges that a named judge is guilty of misconduct or incompetence; it merely prohibits everyone from publishing that the charges have been referred to the Commission. More fundamentally, a flat prohibition on speech in the interest of preserving the reputation of individual judges is barred by this Court's decision in *New York Times Co.* v. *Sullivan, supra.*

Like the first interest, the second interest advanced by the Commonwealth—preserving public confidence in the judicial system—is not effectively promoted by the statutory prohibition in this case. Moreover, the Commonwealth's attempt to further public confidence in its judicial system by limiting discussion of charges against its judges runs counter to the basic principles underlying the First Amendment. In *Bridges* v. *California,* 314 U.S. 252 (1941), this Court rejected out of hand the suggestion that respect for the judiciary could serve as the basis for any limitation on the public discussion of a judge's official conduct. And the *New York Times* and *Garrison* cases completely put to rest any contention that the State may limit speech concerning judges in order to preserve respect for, or confidence in, the judicial system.

The final interest asserted by the Commonwealth—its interest in protecting complainants and witnesses from possible recrimination—cannot support even a limited ban on the accurate identification of complainants and witnesses. It certainly cannot support a broad statutory prohibition like the instant one, which is not

restricted to speech that discloses or may lead to the disclosure of the identity of complainants and witnesses before the Commission.

III.

The "clear and present danger" test should have no application in this case. The test has clearly lost any claim for acceptance as a comprehensive standard for assessing the constitutionality of government restrictions on speech. And *New York Times Co.* v. *Sullivan, supra,* makes abundantly clear that "clear and present danger" analysis is unnecessary in assessing the main interests asserted by the Commonwealth in this case.

To the extent, however, that the "clear and present danger" test retains any vitality—as a minimum requirement that harm to the social order be imminent before speech may be proscribed—the standard reinforces the conclusion that the publication in this case is constitutionally protected.

The General Assembly's enactment of Virginia Code § 2.1-37.13 does not remove from the Commonwealth the burden of demonstrating that the particular publication at issue posed an imminent threat to the administration of justice. The Virginia Court's conclusion to the contrary was based on a wholly unsupported view of the legislative judgment behind Virginia Code § 2.1-37.13. More basically, the Virginia Court's conclusion reflected a degree of deference to legislative judgment that has long been rejected in First Amendment analysis.

There is no basis whatsoever, much less an evidentiary basis in the record, for concluding that appellant's identification of the judge who was the subject

of a Commission investigation posed an imminent threat to the administration of justice.

IV.

Virginia Code § 2.1-37-13 is unconstitutionally vague and overbroad.

Due process requires criminal statutes to be written with sufficient specificity to provide adequate notice to a person of reasonable intelligence that his contemplated conduct is illegal. When First Amendment rights are involved, even stricter standards of permissible statutory vagueness must be applied.

Landmark was forced to guess at the meaning of the word "divulge" in the statute, unaided by any statutory definition or legislative history as to its meaning.

In addition, Virginia Code § 2.1-37.13 is susceptible to such sweeping and improper application that it is void for overbreadth. On its face and as construed by the Supreme Court of Virginia, the statute prohibits disclosure of information concerning Commission proceedings regardless of whether any interest is served by confidentiality.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS THE IMPOSITION OF CRIMINAL SANCTIONS ON THE PRESS FOR THE PUBLICATION OF ACCURATE REPORTS OF GOVERNMENTAL AFFAIRS

As definitively interpreted by the Supreme Court of Virginia, Virginia Code § 2.1-37.13 proscribes, without more, the truthful publication of the fact that the Virginia Judicial Inquiry and Review Commission has

investigated charges about the misconduct or incompetence of a public official—a named state judge. In this case, Landmark was convicted for the substantive content of its "pure speech"[7] solely on "stipulated facts showing Landmark had published the article in question, the Commission had investigated charges and conducted hearings concerning the judge named in the article, and, at the time of the publication, the Commission had not filed a complaint with [the Virginia Supreme] court respecting the judge." J. S. Appendix at pp. 11a-12a; 217 Va. at 707. In short, it is currently a crime in the Commonwealth of Virginia for the press to publish the truth about disciplinary proceedings against state judges.[8]

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[7] Compare, *e.g.*, *Cohen* v. *California*, 403 U.S. 15, 18 (1971), with *United States* v. *O'Brien*, 391 U.S. 367 (1968). See also *Hess* v. *Indiana*, 414 U.S. 105, 107 (1973); *Gooding* v. *Wilson*, 405 U.S. 518, 521-522 (1972).

[8] There is no contention that the speech proscribed by the statute falls within any of the limited categories of expression, such as obscenity or "fighting" words, which this Court has held to be unprotected by the First Amendment. See *Miller* v. *California*, 413 U.S. 15, 23 (1973); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942).

Nor is there any contention that the statute is simply a "time, place or manner" regulation because the record of the Commission's proceedings loses its confidential character if a complaint is filed with the Supreme Court of Virginia. If the Commission does not file a formal complaint, the prohibition against publication becomes permanent. In any event, a statute cannot be deemed a neutral time, place or manner regulation if it singles out certain speech because of its content and totally suppresses just that speech even for a temporary period of time; in such a situation, the state has not left open "ample alternative channels for communication of the [suppressed] information." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), and cases cited therein. See *Young* v. *American Mini Theatres*, 427 U.S. 50, 71-72, n.35 (1976); *Linmark Associates* v.

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964)—a criminal defamation case—this Court plainly delineated the principle that governs this case:

> "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Id.* at 74.

In other words, the dissemination of truthful facts concerning public affairs—particularly, the affairs of government—may not be proscribed, however laudatory the government's objectives.[9] This proposition flows ineluctably from the most basic principles underlying the command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." [10]

Township of Willingboro, 45 U.S.L.W. 4441, 4443-4444 (U.S. May 2, 1977). This consideration is compelling with respect to news of public affairs, where timeliness is essential. *E.g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 560-61 (1976); *id.*, at 609 (Brennan, J., joined by Stewart and Marshall, J.J., concurring); *Bridges* v. *California*, 314 U.S. 252, 268-269, 277-278 (1941); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331, 346 (1946); see *Mills* v. *Alabama*, 384 U.S. 214 (1966).

[9] The one possible caveat would involve criminal sanctions for publication of national security secrets. See generally *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); see *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). That issue is not involved in this case, and the Court should reserve any judgments on it until presented in a concrete factual setting. For even if there is such an exception, compare 403 U.S. at 719 (Black, J., concurring), with 403 U.S. at 733 (White, J., concurring), the constitutionality of the specific statute and its applicability to certain facts may be questioned. See 403 U.S. at 730 (Stewart, J., concurring). Indeed, in light of First Amendment concerns, the government may be required to prove, for example, that the truthful publication of national security secrets in fact damaged the national security. Cf. *Wood* v. *Georgia*, 370 U.S. 375, 393 (1962).

[10] The First Amendment, of course, applies with full vigor to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Wood* v. *Georgia*, 370 U.S. 375 (1962).

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Indeed, this Court has expressly recognized that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." [11] *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The First Amendment thus promotes the most basic goal of a democratic system—an informed citizenry. It ensures that the people—the ultimate repository of power and sovereignty in our Republic—will have the ability effectively and intelligently to govern themselves.[12]

> "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. at 74-75.

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[11] The Court defined "governmental affairs" to include "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." 384 U.S. at 218.

[12] "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power." A. Meiklejohn, *The First Amendment is an Absolute*, 1961 S. Ct. Rev. 245, 257.

See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Z. Chafee, Free Speech in the United States (1931).

The First Amendment expressly recognizes the special role of the press in guaranteeing that government is responsive to the will of an informed citizenry. As this Court observed in *Mills* v. *Alabama, supra:*

> "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus *the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.* Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." 384 U.S. at 219 (emphasis supplied).

Of course, the primary way in which the press guards against abuses of power and keeps elected officials responsible to the public is by informing the public about the affairs of government. The Court elaborated on this informational role of the press in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936):

> "The predominant purpose of [the free press guarantee] was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded

> otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* at 250.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), the Court once again stressed the public's reliance upon the press for accurate information concerning its government:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government,* and official records and documents open to the public are the basic data of governmental operations.[11] Without the information provided by the

[11] While official records open to the public may provide "the basic data of governmental operations," the facts of the instant case make clear that at least in the Commonwealth of Virginia they do not provide the complete data. Assuming *arguendo* that the Commonwealth may constitutionally deny access to information pertaining to the affairs of government—a question which this case does not present—it may not, *amici* submit, punish the press for publishing such information. The protection that the press enjoys to report on governmental affairs requires, at the very least, that it be permitted to publish what it learns.

Nothing in *Cox Broadcasting* is to the contrary. The Commonwealth places great weight on this Court's observation in that case that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." 420 U.S. at 496. Motion to Affirm at 4. But that observation does no more than state that if there are *private* matters that the state seeks to protect, it may do so only by keeping them off the public record. See also *id.* at 491. It certainly does not support the essentially limitless proposition advanced by the Commonwealth—that the

press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 491-92 (emphasis supplied).

As these cases make abundantly clear, the most basic role of the press in our constitutional scheme is to provide the public with accurate information about public issues, the operation of government, and the stewardship of public officials. And the free dissemination of such information is essential, for without it the public cannot effectively and intelligently exercise its sovereign power.[14]

Accurate information concerning the affairs of government is crucial, *amici* stress, not only to the public's

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state may take concededly truthful non-private facts relating to the conduct of government and make their dissemination criminal by the simple expedient of declaring them "confidential." Under that proposition, the state could prohibit public commentary on criminal actions or impeachment proceedings against judges, legislators and executive officials—at least until a finding of probable cause is made.

[14] "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives."

Letter from Madison to W. T. Barry (Aug. 4, 1822), reprinted in 9 Writings of James Madison, at 103 (G. Hunt ed. 1910).

"The policy of the First Amendment favors dissemination of information and opinion." *Bigelow* v. *Virginia*, 421 U.S. 809, 829 (1975).

ability to control its government, but also to its ability to arrive at the wisest governmental policies. Central to the First Amendment's guarantees is the notion that political and economic "truth" will only be achieved when ideas are tested in the marketplace of public opinion.

> "The safeguarding of [First Amendment] rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education is essential to free government. *Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.* Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) (emphasis supplied).[15]

Indeed, the utterances that may constitutionally be punished are those which "are no essential part of any exposition of ideas, and are of *such slight social value as a step to truth* that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hamp-*

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[15] See also *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *Wood* v. *Georgia*, 370 U.S. 375, 389 (1962); *Ashton* v. *Kentucky*, 384 U.S. 195, 199-200 (1966).

shire, 315 U.S. 568, 572 (1942) (emphasis supplied). If the goal of public discussion and debate is to arrive at political, economic, and social truth through the processes of education and counterargument, then it is clear that, at the very least, accurate factual statements concerning governmental affairs must be protected."[16]

This Court has on numerous occasions recognized the protection that the First Amendment extends to truthful statements concerning public affairs. In *Thornhill* v. *Alabama, supra*—a case involving dissemination of the facts of a labor dispute—the Court stressed "the public need for information and education with respect to the significant issues of the times," 310 U.S. at 102, in concluding:

> "The freedom of speech and of the press guaranteed by the Constitution embraces *at the least* the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or

[16] It is even impermissible for the state to excise a "scurrilous epithet" from the public discourse on the ground that it is "offensive" to most people, because "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen* v. *California,* 403 U.S. 15, 26 (1971). The state cannot make principled distinctions in this area, and there is an ever-present danger that empowering the government to delete language from the "verbal cacophony" that is this Nation's strength will ultimately lead to suppression of unpopular views. *Id.,* at 25-26.

If there is a danger that unpopular views and ideas on the most efficacious means to conduct or reform the government may be suppressed when the government punishes publication of particular *words,* that danger is magnified enormously if the government may punish the publication of concededly truthful *facts* pertaining to public officials or public affairs.

> fear of subsequent punishment." 310 U.S. at 101-02 (emphasis supplied).[17]

The conclusion that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned," although stated most concisely in *Garrison* v. *Louisiana, supra,*[18] is central to the entire line of cases beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). Those cases make clear that "the defense of truth is constitutionally required where the subject of the [defamatory] publication is a public official or public figure." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 490 (1975). Indeed, because factual errors are inevitable in free and vigorous debate, those cases hold that many false statements of fact must be protected from criminal or civil sanctions so as to allow adequate "breathing space" for truthful speech to flourish. *New York Times, supra,* at 271-72; *Garrison, supra,* at 74. "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the

[17] The Court in *Thornhill* also noted that allowing punishment of truthful speech would permit tyranny of the governing majority:

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." 310 U.S. at 104.

[18] The Court in *Garrison* also noted its agreement with the New Hampshire court in *State* v. *Burnham,* 9 N.H. 34, 42-43, 31 Am. Dec. 217, 221 (1837):

> "If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice." 379 U.S. at 73.

First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968).

The conclusion that truthful utterances concerning governmental affairs may neither be suppressed nor punished is also mandated by this Court's recent line of "commercial speech" cases. As the Court held in striking down Virginia's ban on advertisements of prescription drug prices by licensed pharmacists, a "State may [not] completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). See also *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 28, 1977); *Carey* v. *Population Services International*, 45 U.S.L.W. 4601, 4606-07 (U.S. June 7, 1977); *Linmark Associates* v. *Township of Willingboro*, 45 U.S.L.W. 4441, 4443-44 (U.S. May 3, 1977); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

The Court's reasoning in *Virginia State Board* was based squarely, and expressly, on the principles of free speech applicable to matters of governmental concern. There is, the Court observed, a "First Amendment right to 'receive information and ideas,'" 425 U.S. at 757, quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972),[19] and "[p]urely factual matter of public interest may claim protection" under that

[19] See, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Marsh* v. *Alabama*, 326 U.S. 501, 505 (1946); *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

Amendment. *Id.* at 762.[20] Society has a "strong interest in the free flow of commercial information," just as it does in the free flow of political information. *Id.* at 763-64. In both cases, the ultimate purpose is to "enlighten public decisionmaking in a democracy." *Id.* at 765. The State's arguments against the dissemination of truthful information, the Court observed, were based on the "reactions it is assumed people will have to the free flow of . . . information." *Id.* at 769. The State's position thus constituted "protectiveness of its citizens [based] in large measure on the advantages of their being kept in ignorance." *Ibid.* In language that is directly applicable to this case, the Court flatly rejected that position:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.*" *Id.* at 770 (emphasis supplied).

Subsequently, these principles have been applied to protect truthful advertising of attorneys' fees for rou-

[20] "The protection of the public requires not merely discussion, but information." *New York Times Co.* v. *Sullivan*, 376 U.S. at 272, quoting *Sweeney* v. *Patterson*, 128 F.2d 457, 458 (1942), *cert. denied*, 317 U.S. 678 (1943). See also, *e.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Wood* v. *Georgia*, 370 U.S. 375, 388 (1962); *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940).

tine services, despite a host of interests allegedly served by prohibitions against such advertising, *Bates* v. *State Bar of Arizona,* 45 U.S.L.W. 4895 (U.S. June 28, 1977); truthful information concerning the availability and price of contraceptives, despite arguments that such information was offensive and might legitimate illicit sexual behavior, *Carey* v. *Population Services International,* 45 U.S.L.W. 4601, 4606-07 (U.S. June 7, 1977); and truthful "for sale" signs, despite arguments that they had to be proscribed to further the "vital goal" of stemming "white flight" from a racially integrated community, *Linmark Associates* v. *Township of Willingboro,* 45 U.S.L.W. 4441, 4444 (U.S. May 3, 1977).[21] See also *Bigelow* v. *Virginia,* 421 U.S. 809, 827-829 (1975).

The central teaching of these cases [22] is that the government may not prevent the free flow of truthful information on the paternalistic ground that the citizenry is better off left in ignorance; the government cannot proscribe the "content [of speech] because it fears [its] 'primary effect'—that [it] will cause those receiving the information to act on it." *Linmark Associates, supra,* at 4444. See also *Bates, supra,* at 4901-02. If there is a danger that truthful information will cause people to act contrary to their best interests, "the preferred remedy is more disclosure rather than less." *Ibid.* See also *Linmark Associates, supra,* at 4444. In short, greater education rather than enforced

[21] The Court in *Linmark* noted that the "First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." 45 U.S.L.W. at 4444.

[22] In each of these cases, the Court struck down a legislative judgment that contravened the First Amendment.

silence is the constitutionally mandated means to correct any "detrimental" effects of truthful speech.

As this Court expressly recognized, the teaching of the recent commercial speech cases applies with equal, if not greater, force to speech concerning the affairs of government.[23] Indeed, the dangers of enforced silence are demonstrably greater in the arena of governmental affairs. Those dangers can be illustrated by the apparent constraining effects of the Virginia statute.[24] These effects all flow from the simple and impermissible expedient of prohibiting the dissemination of a truthful fact concerning a matter of governmental affairs—an official investigation into the conduct or character of a sitting judge:

1. The press has the responsibility to report on the administration of justice.[25] Yet if a judge resigns during or after a Commission investigation that reveals his incompetence or malfeasance, in order to avoid the

[23] See pp. 26-27, *supra*. The Court has made it clear that greater leeway for untruthful and misleading expression is required in the governmental and ideological arenas than in the commercial arena. *Bates, supra,* at 4904; *Virginia State Board, supra,* at 771-72 n.24; *id.* at 777-81 (Stewart, J., concurring).

[24] In discussing the effects of the statutory prohibition in this context, we will not address the statute's broader proscription against publication of Commission "proceedings" or the problems created by the statute's vagueness. See pp. 61-65, *infra*. Rather, the statutory evils will be explored in the context of the specific prohibition on the truthful publication of the name of a judge being investigated by the Commission when no formal complaint has been lodged by the Commission with the Supreme Court of Virginia. Similar arguments could be made with respect to sanctions on any specified truthful fact concerning public officials or public affairs.

[25] See, *e.g., Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 491-92, quoted *supra,* at 21-22; *Wood* v. *Georgia,* 370 U.S. at 391.

obloquy of formal public proceedings before the Virginia Supreme Court, it would be a crime to report the circumstances that led to the resignation. The public would thus be deprived of crucial information concerning the caliber of judicial appointments [26] and the possible need to reform the selection process. It would also be deprived of information that may be essential in deciding whether to legislate standards of judicial conduct or impose minimum qualifications for judges —for example, that they be trained as lawyers.

2. The press has the responsibility to uncover abuse of the public trust.[27] Yet it would be a crime to assert that the Commission members had improperly failed to investigate serious charges of incompetence about a named judge; it would even be a crime to report—to the public or to the Attorney General's office—that a named judge had bribed members of the Commission or witnesses to influence the outcome of an investigation into his activities. Neglect of duty and even criminal conduct would thus remain secret, and individuals who do not merit public trust would remain in positions of power. Litigants and the proper administration of justice would continue to suffer as a result.

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[26] There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant." *Garrison* v. *Louisiana*, 379 U.S. at 77.

[27] "[P]ublic men are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952), quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. at 268. See also *Mills* v. *Alabama*, 384 U.S. at 218-19, quoted *supra*, at 20.

3. The press has the responsibility and duty to report on the institutions of government so that the citizenry may make informed judgments as to whether those institutions are operating effectively or whether they should be reformed.[28] Yet it would be a crime for the press to report comprehensively the results of all the Commission's investigations and the circumstances upon which its decisions were based. The press could not, for example, say that Judges A and B had not been disciplined under circumstances identical to those for which Judge C had been censured, nor could it explore the possible reasons for the disparate treatment. The public would thus be deprived of information essential to determine whether to legislate reform of its procedures or standardization of its criteria for discipline.

4. A public official has the responsibility to speak out on matters of public affairs, and the press has the responsibility to report those newsworthy comments. Yet it would be a crime for a legislator to assert, or for the press to report, that certain judges were being harassed by the Commission solely because of their judicial philosophies. Indeed, even the subject judge could not assert such harrassment or demand an investigation of the Commission or its members.

5. The press has the responsibility to insure that the electorate is informed about the qualifications of candidates for public office.[29] In Virginia, judges are

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[28] The protection of the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

[29] "Our chief magistrates and Senators are annually eligible by the people. How are their characters and conduct to be known to

elected by the General Assembly, whose members are themselves elected by the public. The Commission is "authorized," but apparently not required, to transmit to the chairman of the House or Senate Commiteee for Courts of Justice "evidence that it has in its possession with reference to the alleged misconduct of any judge whose term expires during such session of the General Assembly." Virginia Code § 2.1-37.17:1 (b).[30] If the Commission does not transmit relevant evidence to the General Assembly, the Assembly's ability to make an informed judgment will be seriously impaired. And even if the Commission does transmit evidence to the General Assembly, it may be a crime for the press to report to the people, the ultimate electors, the nature of that evidence and how their representatives acted upon it.

As the foregoing examples illustrate, truthful publication of the name of a judge who is the subject of a Commission investigation—like the publication of any other truthful fact about governmental affairs—is absolutely essential if the press is to fulfill its obli-

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their constituents but by the press? If the press is stopped and the people kept in Ignorance we had much better have the first magistrate and Senators hereditary." L. Levy, *Legacy of Suppression* 195 (1960) (John Adams' comments on Massachusetts "freedom of the press" clause).

[30] The Commission is only authorized to transmit evidence concerning a judge during the General Assembly session in which his term expires. The statute contains no authorization for the Commission to transmit evidence to the General Assembly in the event of impeachment proceedings, which are retained as an alternative route for removing judges from office. Virginia Constitution, Art. IV, § 17. Indeed, it would appear to be a crime for a legislator to refer to a Commission investigation in the course of an impeachment proceeding.

gations of exposing corruption of public officials and abuse of government power; of providing the citizenry with accurate information upon which to make intelligent political decisions and sound judgments about the necessity for government reform; of exposing apathy or incompetence of public servants; and of ensuring that ultimate sovereignty remains where it rightfully belongs—with the citizenry of this Nation.

Amici therefore urge this Court to reaffirm the basic proposition that the press may not be punished for the publication of accurate reports concerning the affairs of government. To reaffirm this proposition, *amici* stress, the Court need not consider whether different principles may govern the publication of truthful facts pertaining to wholly private matters. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 491, 496. Nor must it consider whether, or under what circumstances, the government may attempt to deprive the public of access to information—for example, by excluding the public from proceedings and requiring oaths of confidentiality from participants in the proceedings. The Court need only consider whether the government may, consistently with the First Amendment, punish the press for publishing such information as it may learn. *Amici* submit that it may not.

II. THE FIRST AMENDMENT PROHIBITS THE COMMONWEALTH OF VIRGINIA FROM ADVANCING ANY OF THE INTERESTS ASSERTED BELOW BY IMPOSING CRIMINAL SANCTIONS ON THE PRESS PURSUANT TO VIRGINIA CODE § 2.1-37.13.

Amici have contended that truthful statements about governmental affairs may not be punished, however laudatory the government's objectives. Even assum-

ing, however, that the general protection accorded truthful statements admits of exceptions, settled principles of law preclude the imposition of criminal sanctions under the statute involved in this case.

The chief purpose and effect of Virginia's broad statutory prohibition is, quite clearly, to limit public discussion of charges that have been leveled against judges. Attempts to shield judges and other public officials from criticism are not new to this Court, and without exception they have been met with hostility. In a series of four cases dating from 1941 to 1962, this Court invoked the First Amendment to reverse contempt convictions based upon out-of-court statements, some of which were harshly and unfairly critical of judges. *Bridges* v. *California,* 314 U.S. 252 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Craig* v. *Harney,* 331 U.S. 367 (1947); *Wood* v. *Georgia,* 370 U.S. 375 (1962).[31] And since these cases were decided, the Court has on numerous occasions addressed itself

[31] The statements at issue in those cases were far more offensive than the publication involved in this case. In *Bridges,* a newspaper had published an editorial, entitled "Probation for Guerillas?", stating that a judge would be making a "serious mistake" if he granted probation to two union members who had been convicted of assault. 314 U.S. at 271-72. And while a motion for a new trial was pending in a civil case, a labor leader had written that the judge's decision was "outrageous" and would lead to a strike if enforced. *Id.* at 275-77. The editorials and cartoon at issue in *Pennekamp* inaccurately and unfairly described the quashing of indictments and "wondered" whether the courts were being "subverted into refuges for lawbreakers." 328 U.S. at 337 n. 4. The publications in *Craig* inaccurately described a lay judge's rulings, and termed them "arbitrary action" and a "travesty on justice." 331 U.S. at 369, 374. And the publication at issue in *Wood* accused a sitting judge of "charging a Grand Jury in the style and language of a race baiting candidate for political office." 370 U.S. at 380.

specifically to the principal contentions advanced by the Commonwealth of Virginia in this case—in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny.

The Commonwealth of Virginia has contended, and the Supreme Court of Virginia concluded, that the broad statutory prohibition in this case serves three interests: it

> "(1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." J.S. Appendix at p. 18a; 217 Va. at 712.

Amici note at the outset that the Commonwealth has made no attempt to suggest that its statute is designed to prevent improper influence upon the Commission's deliberations. Nor could there be any serious contention to that effect, since the statute sweeps broadly to prohibit all reports of Commission proceedings, not simply reports that may impair the Commission's ability to reach a fair and impartial resolution of charges pending before it. In this respect the instant case is a simpler one than *Bridges, Pennekamp, Craig,* and *Wood.* In those cases, the States' primary contention was that out-of-court statements had an improper influence upon pending judicial proceedings. Indeed, the only question upon which there was any disagreement among the Members of the Court in those cases was

whether the statements could be punished for posing a threat to the fair and impartial adjudication of pending controversies.

The main contentions advanced by the Commonwealth of Virginia in support of its statutory prohibition in this case were rejected out of hand and with unanimity in the contempt of court cases. And they were expressly and thoroughly rejected in the *New York Times* line of cases.

A. The Commonwealth's Interest in Protecting the Reputation of Individual Judges

The Commonwealth's interest in protecting the reputation of individual judges is wholly inadequate to support the legislative prohibition in this case. For one thing, the statute does not serve to protect the reputation of judges. As the Supreme Court of Virginia emphasized, the statute "does not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs." J.S. Appendix at p. 19a; 217 Va. at 712. In other words, the statute does not prevent anyone from publishing charges that a named judge is guilty of misconduct or incompetence; it merely prohibits everyone from publishing that the charges have been referred to the Commission.[32] But

[32] It may be suggested that for this reason the statute is not intended to limit public discussion of charges against judges, but only to limit public discussion of the Commission. It cannot be denied, however, that the effect of the statute is to limit discussion of charges against judges. Indeed, the main interests advanced in support of the statute—protecting the reputation of individual judges and preserving public confidence in the judiciary by preventing publicity involving frivolous complaints—are promoted only to the extent that the statute succeeds in limiting public discussion of charges against judges. If the State's sole concern is that the Commission not be discussed in public, then these interests are wholly irrelevant to the Court's analysis; the only conceivable justification for the statute can be the third interest, protecting complainants and witnesses, an interest which this brief addresses in Part II(C).

the injury to reputation presumably flows from the publication of the charges themselves, not from the mere statement that the charges have been referred to the appropriate authorities. The statutory prohibition is, therefore, not likely to protect the reputation of judges. In fact, the statute in at least some instances would have precisely the opposite effect. While a newspaper could publish charges that a particular judge engaged in misconduct, it could not later report that the Commission found the charges to be without substance—indeed, even the judge himself would be barred from defending his reputation by referring to his vindication by the Commission. Since the Commonwealth's interest in protecting judges' reputations is not effectively promoted by the statutory prohibition, that interest surely cannot sustain it. See *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976); *Mills* v. *Alabama*, 384 U.S. 214, 220 (1966).

There is, in any event, a more fundamental defect in the Commonwealth's attempt to support a flat prohibition on certain kinds of speech by reference to its interest in preserving a judge's reputation. Such a flat prohibition is barred by this Court's decision in *New York Times Co.* v. *Sullivan, supra.* In that case, the Court emphasized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes

unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Even erroneous statements, the Court reasoned, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72. And in language directly applicable to this case, the Court concluded:

> "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." *Id.* at 272.

The *New York Times* Court thus expressly considered and rejected the first contention advanced in support of the statutory prohibition in this case. The Court squarely held that speech, even false speech, concerning public officials does not lose the protection of the First Amendment simply because it is injurious to the public official's reputation. Such speech forfeits the protection of the First Amendment only if it is published "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

The *New York Times* case was a civil libel case, but the Court has since made clear that the principles of *New York Times* "apply with no less force merely because the remedy is criminal." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). After *New York Times* and *Garrison*, the Commonwealth is clearly prohibited from imposing criminal sanctions for speech concerning public officials solely to protect their individual reputations."[11] See also *Pennekamp* v. *Florida*, 328 U.S. at 349.

[11] The Commonwealth cannot escape the clear command of *New York Times* and *Garrison* by its attenuated argument that the statute "preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct." J. S. Appendix, p. 17a; 217 Va. at 711, quoting Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969). The argument of course, leads to a permanent, rather than temporary, ban on the discussion of Commission proceedings against judges inclined to submit to Commission pressure, for a judge will surely be as sensitive to the effect of future discussion of the charges as he is to past discussion. But any such ban—temporary or permanent—is clearly impermissible under this Court's decisions. *New York Times* and its progeny implicitly reject the contention that defamatory speech concerning public officials loses First Amendment protection because it may cause some damage to the institution in which the public official operates. See pp. 42-45, *infra*.

Even apart from *New York Times*, there can be no serious suggestion that the only way to put a stop to conduct deemed undesirable is to limit public awareness of the conduct. On the contrary, the very foundation of the First Amendment is that public awareness and discussion of the performance of public officials is the surest way to enforce the highest standards of conduct. See pp. 19-22, *supra*. The Commonwealth evidently takes the view that the truth may be withheld from the people because it fears that people will react "irrationally"—they may presume that a judge's modification of his behavior constitutes an admission of misconduct when in fact it does not. But "the preferred remedy" for that evil "is more disclosure rather than less." *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. at 4901-02. See pp. 26-29, *supra*.

B. The Commonwealth's Interest in Preserving Public Confidence in the Judicial System

The second interest advanced by the Commonwealth —preserving public confidence in the judicial system —is no more substantial than the first. Indeed, it is virtually indistinguishable from the first. The Commonwealth's concern is simply that the disclosure of defamatory charges against a judge will necessarily undermine public confidence in the system in which he operates. But if the Commonwealth's interest in

protecting the reputations of judges cannot sustain the statute, neither can its interest in preserving public confidence in the judicial system.

Public confidence in the judicial system is not preserved by the statutory prohibition in this case. On the contrary, it is clearly undermined by a rule which, recognizing the right to publish charges of judicial misconduct, forbids reference to the fact that the charges are being investigated—and even forbids reference to the fact that the charges have been found to be without merit. The former prohibition invites the public to form the impression that the system is not concerned with policing itself, the latter that frivolous charges have merit. In the most immediate sense, the statutory prohibition in this case is ineffective in promoting public confidence in the judicial system. For this reason alone the interest in promoting public confidence cannot sustain the statute. See *Buckley* v. *Valeo*, 424 U.S. at 45; *Mills* v. *Alabama*, 384 U.S. at 220.

On an even more fundamental level, however, the Commonwealth's attempt to further public confidence in its judicial system by limiting discussion of charges against its judges runs counter to the basic principles underlying the First Amendment. In *Bridges*, this Court rejected out of hand the suggestion that respect for the judiciary could serve as the basis for any limitation, however narrow, on the public discussion of a judge's official conduct:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, *however limited*, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." 314 U.S. at 270-71 (emphasis added). See also *Pennekamp* v. *Florida*, 328 U.S. at 349.

This conclusion in *Bridges*, from which there was no dissent,[24] is not simply an empirical judgment that the

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[24] Mr. Justice Frankfurter, joined by three other Members of the Court, dissented from the judgment in *Bridges* on the ground that the out-of-court statements threatened the "impartial disposition" of a pending judicial proceeding—a question which, *amici* repeat, is not presented in this case. But Mr. Justice Frankfurter and the other dissenters were in complete agreement with the Court's conclusion that out-of-court statements could not be punished in order to promote respect for the judiciary:

> "The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal." 314 U.S. at 291-92 (Frankfurter, J., dissenting).

Mr. Justice Frankfurter restated his view in *Craig* v. *Harney*, 331 U.S. at 389 (Frankfurter, J., dissenting):

> "We are not dealing here with criticisms, whether temperate or unbridled, of action in a case after a judge is through with it, or of his judicial qualifications, or of his conduct in general. Comment on what a judge has done—criticism of the judicial process in a particular case after it has exhausted itself—no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth."

See also *Pennekamp* v. *Florida*, 328 U.S. at 350 (Frankfurter, J., concurring).

Commonwealth of Virginia is free to ignore. It is mandated by the principles of free debate underlying our democratic form of government. See pp. 19-24, *supra*.

The *New York Times* case completely puts to rest any contention that the state may limit speech concerning judges in order to preserve respect for, or confidence in, the judicial system. *New York Times* was itself a libel case, directly involving only the interest of a public official in his individual reputation. But when the Court announced that speech concerning a public official does not forfeit First Amendment protection simply because of its defamatory content, the Court did not restrict its vision to the effect of speech on individual reputation. The Court was fully aware that speech that injures the reputation of a public official may also tarnish the image of the system in which he operates. And the broad principles the Court articulated were not confined to the punishment of speech in the name of protecting the individual reputations of public officials; they clearly embraced attempts to punish speech in the name of protecting the institutions of government.

Thus, the Court expressly noted and approved history's rejection of the Sedition Act of 1798, which made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act was "inconsistent with

the First Amendment," the Court concluded, "because of the restraint it imposed upon criticism of government and public officials." 376 U.S. at 276.

With particular respect to the judicial system, the *New York Times* Court expressly reaffirmed that

> "concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision . . . . This is true even though the utterance contains 'half truths' and 'misinformation.' " 376 U.S. at 272-73 (citations omitted).

That the judiciary stands on no special footing was forcefully demonstrated by the Court's decision in *Garrison* v. *Louisiana, supra*.[35] In that case, a district attorney was convicted under a criminal contempt statute for issuing a statement that criticized the behavior and impugned the motives of all eight judges of a local criminal court.[36] Against these facts, the Court in *Garrison* was faced with the question "whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials." 379 U.S. at 67. In address-

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[35] See also *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. at 4900, in which the Court rejected the notion that attorney advertising may be proscribed on the ground that it would "erode the client's trust in his attorney" and "tarnish the dignified public image of the profession."

[36] The statement attributed a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges; charged that the judges had hampered his efforts to enforce vice laws; and raised questions about "the racketeer influences on our eight vacation-minded judges." 379 U.S. at 66.

ing this question, the Court did not even pause to consider whether any possible harm to the public image of the judicial system called for a modification of the broad protection of *New York Times*. "Where criticism of public officials is concerned," the Court concluded, "we see no merit in the argument that criminal statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations." *Ibid.*

After *Bridges, New York Times,* and *Garrison*, the command of the First Amendment could not be made more clear: speech concerning the conduct of judges may not be prohibited in the name of preserving public confidence in the judicial system. The command, it bears emphasis, is an unqualified one. While *Bridges* was decided when the clear and present danger test reigned as the general test for judging the constitutional validity of restraints on speech, its rejection of public respect for the judiciary as a justification for restraint on speech was absolute. And *New York Times* and its progeny do not hold that speech may be punished if it poses a clear and present danger to the state's interest in preserving confidence in, and respect for, the institutions of government;[17] they hold flatly

[17] *New York Times* does say that the criminal contempt sanction for criticism of a judge "can be justified, *if at all*, only by a clear and present danger of the *obstruction of justice*." 376 U.S. at 273 (emphasis added). But this reference to "clear and present danger" did not qualify the Court's flat statement that "concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision." *Id.* at 272-73. The reference was expressly restricted to instances of "obstruction of justice." The Court was merely leaving open a question not presented in that case or in the instant case—whether out-of-court statements can be punished upon a showing that they pose a clear and present, or imminent, threat to the fair and impartial adjudication of a pending controversy.

It has been suggested that the *New York Times* Court could have chosen to apply the clear and present danger test to the issues before it, as it had been urged to do a decade before in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), and that the Court's decision in *New York Times* marks the demise of the clear and present danger test. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191, 213-14. See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 8-10, 14-15 (1965).

that speech does not lose the protection of the First Amendment simply because it damages the reputation of public officials or tarnishes the image of our governmental institutions.

As an attempt to preserve public confidence in its judicial system, Virginia's statutory prohibition is invalid on its face.

C. The Commonwealth's Interest in Protecting Complainants and Witnesses Before the Commission

The final interest asserted in support of Virginia's statutory prohibition is its interest in "protect[ing] complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious," and thereby encouraging citizens to provide information relating to the conduct of judges.

There is no contention that this interest is directly implicated in this case. Nor could there be such a contention since the publication in question merely disclosed the identity of the judge under investigation, not the identities of any complainants or witnesses.

While *amici* contend that even a limited ban on the accurate identification of complainants and witnesses would violate the First Amendment,[38] there is no need for the Court to consider that question. For even assuming that the Commonwealth's interest in preserving the anonymity of complainants and witnesses could support such a limited ban, it clearly cannot support Virginia's broad prohibition on *all* speech concerning Commission proceedings.

Such a broad prohibition violates the cardinal principle that legislative enactments must be "closely drawn

[38] As an initial matter, *amici* note that any prohibition on publishing the identities of complainants and witnesses will be wholly ineffective unless the Commission proceedings themselves are conducted in such a way as to prevent the judge under investigation from learning the identity of those who bring and support the charges against him. There is no assurance under the present statute that the Commission proceedings are so conducted.

In addition, there is no reason whatsoever to believe that a ban on speech is necessary to accomplish the state's purposes. Actual recrimination by a judge against complainants and witnesses against him is easily and effectively prevented by means short of prohibiting speech—namely, by a rule disqualifying the judge in matters involving litigants or lawyers who have provided information against him. And it is the assurance that ours is a system in which charges can be openly aired and resolved without recrimination that must ultimately serve as the encouragement for citizens to come forward with such information as they may have.

There is, in fact, reason to believe that a ban on the identification of complainants and witnesses would run counter to the Commonwealth's interests. Public awareness of the identities of complainants and witnesses would serve as a powerful deterrent to a judge's taking recriminatory measures. And publishing the names of reputable citizens who have provided information to the Commission may firm up the resolve of others to step forward.

Finally, if any assurance of confidentiality is deemed necessary to encourage citizens to exercise their responsibility to come forward with information, the Commonwealth is hard-pressed to explain why a pledge of confidentiality among the participants in the proceeding would not suffice.

to avoid unnecessary abridgment" of First Amendment rights. *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976). As this Court explained in *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973):

> "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." (Citations omitted).

See also *United States* v. *Robel*, 389 U.S. 258, 265, 268 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

There are far less drastic means to protect the anonymity of complainants and witnesses than a prohibition on all references to Commission proceedings.

III. THE PUBLICATION IN QUESTION IS PROTECTED BY THE FIRST AMENDMENT IN THE ABSENCE OF ANY EVIDENCE THAT IT CREATED AN IMMINENT THREAT TO THE ADMINISTRATION OF JUSTICE.

The Supreme Court of Virginia, in upholding the constitutionality of Virginia Code § 2.1-37.13, concluded that its strict limitations on speech were necessary to prevent a clear and present danger to the administration of justice. It is *amici's* position that the "clear and present danger" test should have no application in this case. The test has clearly lost any claim for acceptance as a comprehensive standard for assessing the constitutionality of government restrictions on speech. And the *New York Times* case makes abundantly clear that "clear and present danger" analysis is

unnecessary in assessing the interests asserted by the Commonwealth in this case. To the extent, however, that the "clear and present danger" test retains any vitality—as a minimum requirement that harm to the social order be imminent before speech may be proscribed—the standard reinforces the conclusion that the publication in this case is constitutionally protected.

A. The First Amendment Requires, at a Minimum, that Speech Concerning the Administration of Justice be Protected in the Absence of Evidence of an Imminent Threat to the Administration of Justice.

In describing the "minimum compulsion" of the First Amendment, *Bridges* v. *California*, 314 U.S. at 263, this Court has stated in each of the four contempt cases cited above that speech may not be punished if it does not pose a "clear and present danger" to the fair administration of justice. *Id.*, at 261-63; *Pennekamp* v. *Florida*, 328 U.S. at 334-36, 347-50; *Craig* v. *Harney*, 331 U.S. at 372-78; *Wood* v. *Georgia*, 370 U.S. at 384-88. At the time *Bridges*, *Pennekamp*, and *Craig* were decided, the "clear and present danger" test—first articulated by Mr. Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47 (1919) [39]—was widely accepted as a convenient measure of the constitutionality of various government restrictions on speech. See

[39] Justice Holmes' statement of the test in *Schenck* was as follows:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52.

Bridges, 314 U.S. at 262.[40] But since then the Court's use of "clear and present danger" terminology has steadily declined.[41] Indeed, the last case in which this

[40] The "clear and present danger" test had its initial application in a series of cases in which criminal charges under the Espionage Act of 1917 were grounded upon publications deemed to pose a threat to the country's war effort in World War I. *Schenck* v. *United States*, 249 U.S. 47 (1919); *Frohwerk* v. *United States*, 249 U.S. 204 (1919); *Debs* v. *United States*, 249 U.S. 211 (1919); *Abrams* v. *United States*, 250 U.S. 616 (1919); *Schaefer* v. *United States*, 251 U.S. 466 (1920); *Pierce* v. *United States*, 252 U.S. 239 (1920).

The "clear and present danger" standard was later invoked unsuccessfully by Mr. Justice Holmes and Mr. Justice Brandeis in the criminal anarchy and criminal syndicalism cases, in which criminal charges were brought pursuant to state statutes proscribing advocacy of violence as a means of accomplishing industrial or political change. *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Whitney* v. *California*, 274 U.S. 357 (1927), *overruled*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Later, the Court applied the "clear and present danger" standard to evaluate statutes prohibiting picketing, *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), and regulating public solicitation on behalf of charitable organizations. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

When *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), was decided at the close of the 1940's, all of the Members of the Court who addressed the merits of the case agreed on the applicability of the "clear and present danger" test.

[41] The decline of the "clear and present danger" test was due in part to the inadequacies of the test itself and in part to the perplexities of more recent speech cases, in which application of the test would prove difficult, if not impossible. But the decline can also be attributed in large part to the "reinterpretation" of the test in the Smith Act cases, discussed in note 46 *infra*. See *e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 S.Ct. Rev. 191, 213; Strong *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 S. Ct. Rev. 41, 53ff.

The "clear and present danger" test, it should be noted, has been much criticized by commentators. See, *e.g.*, Corwin, *Bowing Out "Clear and Present Danger,"* 27 Notre Dame Lawy. 325

Court expressly employed the "clear and present danger" test to evaluate whether "pure speech" fell outside the protection of the First Amendment was *Wood,* decided in 1962;[42] and in that case the Court applied the test for the sole purpose of assessing a claim, not present in this case, that speech posed a threat to the fair resolution of a pending judicial proceeding.[43]

The "clear and present danger" test has quite apparently lost any claim for acceptance as a comprehensive standard for assessing the constitutionality of government restrictions on speech. What remains of Mr. Justice Holmes' standard, *amici* submit, is a statement of the *minimum* command of the First Amendment in a limited category of cases. When the govern-

(1952); Freund, The Supreme Court of the United States 42-44 (1961); Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 910-12 (1963); Kalven, *supra,* at 213-14; Krislov, The Supreme Court and Political Freedom 89-90, 122 (1968); Strong, *supra.*

[42] "Clear and present danger" language has since been employed in two speech-plus-conduct cases. In *Edwards* v. *South Carolina,* 372 U.S. 229 (1963), the Court referred to the test in holding that the First Amendment precluded the state from imposing criminal sanctions upon a group of Negro college students peacefully picketing on the grounds of the state capitol. And in *Cox* v. *Louisiana,* 379 U.S. 559 (1965), the Court upheld convictions for picketing near a courthouse on the ground that, assuming the applicability of the clear and present danger test, the *conduct* engaged in by the picketers met that test.

[43] It may well be that the notion of "clear and present danger" retains some vitality in cases like *Wood* and the prior contempt cases, in which it is claimed that out-of-court statements threaten the fair and impartial resolution of a pending proceeding. See *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976). Even in this limited context, however, *amici* submit that the notion is of relevance only as a *minimum* command of the First Amendment. See discussion *infra.*

ment seeks to restrict speech because of the effect of the ideas conveyed upon the social order or the operation of government, the minimum requirement of the First Amendment is that the harm apprehended be so imminent that there is no time for counterpersuasion. The contempt of court cases—*Bridges, Pennekamp, Craig,* and *Wood*—leave no doubt about this principle. The "clear and present danger" cases, the *Bridges* Court observed, "do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights." 314 U.S. at 263; See also *Wood,* 370 U.S. at 384 n.6.[44] That minimum compulsion was clearly expressed by the Court in *Craig:*

> "The fires which [the speech] kindles must constitute an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376.

[44] The "minimum compulsion" described by the *Bridges* court embraced not only a requirement that the harm apprehended be imminent, but also a requirement that "the substantive evil . . . be extremely serious." 314 U.S. at 263. In *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969)—a case in which the state sought to punish speech because of the threat of imminent violence or lawless action—the Court focused on the nature of the speech as well as its likely consequences; it imposed an additional requirement that the speech constitute *advocacy* of the imminent use of violence or law violation—a category of speech that quite obviously does not embrace accurate factual reports of the affairs of government.

In different contexts, still other requirements may be appropriate. And, of course, First Amendment adjudication is always guided by certain general principles frequently applied by this Court—for example, the related requirements that the state's means bear more than a rational relationship to its purpose, see, *e.g., Thomas* v. *Collins,* 323 U.S. 516, 530 (1945), and that no less restrictive means be available, see p. 47, *supra.*

See also *id.* at 373; *Bridges,* 314 U.S. at 263; *Pennekamp,* 328 U.S. at 334; *Wood,* 370 U.S. at 385. In *Wood,* the Court interpreted this language to require a showing of an "actual interference with the undertakings of the grand jury." *Id.* at 393.

The same requirement of imminence governs attempts to punish speech deemed harmful to other institutions of government or to the maintenance of order itself. Thus, in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969), the Court invalidated the Ohio Criminal Syndicalism statute by applying the following standard:

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added)."

The requirement of imminent harm received special emphasis in *Hess* v. *Indiana,* 414 U.S. 105, 108-09 (1973). There the Court set aside a disorderly conduct conviction because of the lack of evidence, required by the First Amendment, that the defendant's words "were intended to produce, and likely to produce, *imminent* disorder." *Id.* at 109 (emphasis in original). *See also Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441 (1974)."

" It is noteworthy that in restating the principle that harm must be imminent before speech may be punished, the *Brandenburg* Court did not employ "clear and present danger" terminology.

" In modern times it was only in the Smith Act cases that the Court, faced with what it perceived to be a peculiar threat posed by international communism, compromised the requirement that

This minimum requirement that the harm apprehended be imminent was an integral part of the clear and present danger test envisioned by Holmes and Brandeis. Mr. Justice Brandeis explained the basis and content of the requirement in *Whitney* v. *California,* 247 U.S. 357 (1926) (Brandeis, J., concurring):

> "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, *unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.* If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with

the harm apprehended be imminent before speech may be punished. See *Dennis* v. *United States,* 341 U.S. 494, 503-10 (1951); *Yates* v. *United States,* 354 U.S. 298 (1957); *Scales* v. *United States,* 367 U.S. 203 (1961); *Noto* v. *United States,* 367 U.S. 290 (1961). In those cases the Court held that

> "indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' . . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." *Yates,* 354 U.S. at 321.

As the discussion in the text so clearly illustrates, the requirement that the harm apprehended be imminent has been fully restored by the Court. Indeed, in *Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441 (1974), the Court reaffirmed the requirement of imminent harm in the only context in modern times in which it had ever been compromised.

freedom. Such, in my opinion, is the command of the Constitution." *Id.* at 377 (emphasis added)."

In a nation committed to the proposition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States,* 250 U.S. 616, 630 (Holmes, J., dissenting), punishment of speech concerning governmental affairs because of its possible harmful effect is inherently suspect. When the harmful effect is less than imminent and there is ample opportunity to guard against it through counterpersuasion, there can be no basis whatsoever for interfering with the free debate envisioned by the First Amendment;[47] the speech must be protected.

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[47] See also *Thornhill* v. *Alabama,* 310 U.S. 88, 104-05 (1940); *Abrams* v. *United States,* 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting):

> "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command [of the First Amendment]."

[48] "Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Wood* v. *Georgia,* 370 U.S. at 389.

See also *id.* at 391.

B. The General Assembly's Enactment of Virginia Code § 2.1-37.13 Does Not Remove from the Commonwealth the Burden of Demonstrating that the Particular Publication at Issue Posed an Imminent Threat to the Administration of Justice.

In *Bridges, Pennekamp, Craig,* and *Wood,* the Court engaged in close scrutiny of the particular statements at issue to determine whether they fell within the protection of the First Amendment. As the Court stated in *Pennekamp,* this independent review of the particular facts at issue is required by the Court's role as final arbiter of the meaning of the Constitution:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." 328 U.S. at 335.

In each of the four cases, the Court concluded that the particular utterances in question were protected by the First Amendment.

The Commonwealth of Virginia has argued, and the Supreme Court of Virginia concluded, that this particularized scrutiny of the factual predicate for a conviction is unnecessary when the conviction is based on a statute. In contrast to the contempt convictions addressed by this Court in prior cases, the Supreme Court of Virginia noted, the conviction in this case "springs from a clear and well-defined legislative dec-

laration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice." J. S. Appendix at pp. 14a-15a; 217 Va. at 709. Given this legislative declaration, the Supreme Court of Virginia reasoned, there was no need to examine the particular circumstances that led to appellant's conviction; it was sufficient, the Court concluded, that the general evils to which the statute was directed were "serious and substantial." J.S. Appendix at p. 15a; 217 Va. at 710. In support of its view that the legislative enactment of Virginia Code § 2.1-37.13 eliminates the need for the particularized factual scrutiny that characterized this Court's decisions in *Bridges, Pennekamp, Craig,* and *Wood,* the Supreme Court of Virginia referred to language in *Bridges.* Citing *Gitlow* v. *New York,* 268 U.S. 652, 671 (1925), the *Bridges* Court had written:

> "[T]he legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation." 314 U.S. at 260-61.

The Supreme Court of Virginia's reliance upon this language in *Bridges* is wholly misplaced. For one thing, it is not at all clear that the Virginia legislature made a judgment that the criminal sanction should be applied against anyone other than the person who first discloses information.[49] But even assuming that the legislative judgment extended to those who republish

[49] See pp. 61-65, *infra.*

divulged information, the legislative judgment is so lacking in specificity as to be unworthy of any judicial deference. The statute is written in extremely broad, general terms—covering "[a]ll papers filed with and proceedings before the Commission," and it can hardly be said that the Virginia legislature "appraised a *particular* kind of situation and found a *specific* danger sufficiently imminent to justify a restriction on a *particular* kind of utterance." *Ibid.* (emphasis added). There is certainly nothing in the legislative history of the provision to suggest that the Virginia legislature made the rigorous determination of imminent danger that the First Amendment requires. The Supreme Court of Virginia proceeded on a wholly unsupported view of the legislative judgment behind Virginia Code § 2.1-37.13.

There is, moreover, a far more fundamental error in the Virginia Court's conclusion that the existence of a statute punishing certain forms of speech removes the necessity for a judicial determination that a particular statement is unprotected by the First Amendment. The conclusion reflects a degree of deference to legislative judgment that has long been rejected in First Amendment analysis. The approach of the Virginia Court is essentially the now-discredited approach followed by this Court in *Gitlow* v. *New York,* 268 U.S. 652 (1925), and *Whitney* v. *California,* 274 U.S. 357 (1927), overruled in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

In *Gitlow* and *Whitney*—which, unlike the prior "clear and present danger" cases,[50] involved statutes

[50] In the prior cases criminal charges were brought under the Espionage Act of 1917, which in general prohibited conspiracies

directed to certain kinds of speech—the Court concluded that it was unnecessary to assess the danger posed by a particular utterance within the scope of the statute's proscription.[51]

This approach has been throughly repudiated. It is the opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Gitlow* and *Whitney* that have since been accepted as accurate statements of the law. See *Dennis* v. *United States*, 341 U.S. 494, 506-07 (1951) (Opinion of Vinson, C.J.), 536-37, 541 (Frankfurter, J., concurring). Mr. Justice Brandeis stated the governing principles in these words:

> "[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, . . . the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was

and attempts to obstruct military recruiting or otherwise interfere with the nation's war effort. See note 40, *supra*. The statute did not expressly forbid speech; in each case the speech merely provided the evidentiary basis for the conviction.

[51] "[W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such a danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration." *Gitlow* v. *New York*, 268 U.S. 652, 670 (1925). See also *id.* at 671.

> imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." *Whitney* v. *California*, 274 U.S. at 378-79 (Brandeis, J., concurring).

See also *Gitlow* v. *New York*, 268 U.S. at 672-73 (Holmes, J., dissenting); *Taylor* v. *Mississippi*, 319 U.S. 583, 589-90 (1943); *Watts* v. *United States*, 394 U.S. 705 (1969); *Brandenburg* v. *Ohio*, *supra*.

To the extent, then, that *Bridges* contains any implication that a particular application of a statute directed at speech need not be justified by the particular circumstances of its application, that implication was based upon decisions that have long since been repudiated," and it can have no bearing whatsoever on this case.

C. The Publication at Issue Did Not Pose an Imminent Threat to the Administration of Justice.

The publication involved in this case accurately reported that the Judicial Inquiry and Review Commission was conducting a formal hearing on charges that a named Juvenile and Domestic Relations Court

[52] The very language in *Bridges* upon which the Virginia Court relied was accompanied by a citation to *Gitlow* and was quite clearly included in the Court's opinion in order to distinguish *Gitlow*. In *Wood* v. *Georgia*, 370 U.S. at 386, the Court, quoting *Bridges*, observed that the contempt judgment did not come to the Court "encased in the armor wrought by prior legislative deliberation." This language was evidently intended to emphasize that the Georgia Court of Appeals ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements; the language carried no implication that the Court's particularized scrutiny of the facts underlying the contempt conviction in that case would have been unnecessary if the conviction had been based upon a statute barring certain out-of-court statements.

Judge was incompetent. The article described the function and procedures of the Review Commission, and summarized the status of its inquiry in the particular case as follows: "No formal complaint has been filed by the Commission against [the judge], indicating either that the five-man panel found insufficient cause for action or that the case is still under review." Appellant's crime was to "unlawfully divulge the identification of a Judge" who was the subject of a Commission investigation.

There is no basis whatsoever, much less an evidentiary basis in the record, for concluding that appellant's identification of the judge who was the subject of a Commission investigation posed an imminent threat to the administration of justice. The Commonwealth contends that the article at issue may have undermined public confidence in the judicial system and its judges.[33] As an initial matter, *amici* note that the Commonwealth has not even offered any evidence to suggest that the underlying charge of incompetence against the judge was not meritorious. Regardless of the merits of the charge, however, the article presented a balanced report that was as likely to further public confidence in judges and the judicial system as undermine it. For the article gave the public the assurance that when charges of incompetence are made, they are investigated by a panel specially created for that purpose. Finally, assuming *arguendo* that the article may have lessened public confidence in the judiciary, it did not thereby create the kind of imminent threat to the administration of justice that the First Amendment

[33] Since the article identified only the judge, not any complainants or witnesses, it created no danger of recriminations.

requires. See *Bridges,* 314 U.S. at 270; *Pennekamp,* 328 U.S. at 349. For whatever unfair adverse inferences individual members of the public may have drawn from the article can clearly be cured by counter-persuasion.

IV. VIRGINIA CODE § 2.1-37.13 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD

In the preceding sections, *amici* have contended that the publication at issue in this case is protected by the First Amendment. Assuming *arguendo* that Landmark's publication may be the subject of criminal sanctions, Virginia Code § 2.1-37.13 must still fail on vagueness and overbreadth grounds.

A. Vagueness

Landmark was indicted and convicted for violating the Virginia Code's prohibition on "divulg[ing]" information concerning the Virginia Judicial Inquiry and Review Commission. In the Virginia courts, Landmark contended that the operative word of the statute, "divulge," encompassed only the first act of disclosure by a participant in Commission proceedings, and not subsequent publication by the press. The Supreme Court of Virginia, while agreeing with Landmark that the statute should be strictly construed, rejected Landmark's interpretation of the statute. The word "divulge," it concluded, "means to disclose [information] or to make it known," and encompasses all publications up to the time a formal complaint against a judge is filed with the Supreme Court. J.S. Appendix at pp. 4a-5a; 217 Va. at 702. As so construed, the statute is void for vagueness.[34]

[34] *Amici* note that Virginia Code § 2.1-37.13 is vague in other

This Court has consistently held that due process requires criminal statutes to be written with sufficient specificity to provide adequate notice to persons of reasonable intelligence that their contemplated conduct is illegal. As the Court declared in *Hynes* v. *Borough of Oradell*, 425 U.S. 610 (1976):

> "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." 425 U.S. at 620, quoting from *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

See also *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976); *Winters* v. *New York*, 333 U.S. 507, 515 (1948); *Pierce* v. *United States*, 314 U.S. 306, 311 (1941); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926)."[55] When First

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respects as well. On its face, the statute prohibits disclosure of

> "[a]ll papers filed with and proceedings before the Commission, and under the two preceding sections [§§ 2.1-37.11 and 2.1-37.12], including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter . . . ."

Nothing in the record indicates that Landmark's publication constituted disclosure of "papers filed with and proceedings before the Commission." The article did not discuss the substance of the Commission hearing and did not state what determination, if any, had been made by the Commission. The Supreme Court of Virginia, however, concluded that the statute prohibited disclosure of "all information concerning a proceeding before the Commission." J.S. Appendix at p. 4a; 217 Va. at 702. *Amici* submit that this broad interpretation of the statutory terms raises notice problems as well, and necessitates a finding that the statute is void on vagueness grounds.

[55] In *Connally* v. *General Construction Co.* the Court declared: "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words

Amendment rights are involved, even stricter standards of permissible statutory vagueness must be applied; "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Hynes* v. *Borough of Oradell*, 425 U.S. at 620, quoting from *Smith* v. *California*, 361 U.S. 147, 151 (1959). See also *Buckley* v. *Valeo*, 424 U.S. 1, 40-41 (1976); *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287-88 (1961).

In the instant case, Landmark was forced to guess at the meaning of the word "divulge," unaided by the Virginia General Assembly. The word is nowhere defined in the statute; the legislative history contains no reference to its meaning; and there was no judicial precedent available to Landmark in attempting to construe the term "divulge" in Virginia Code § 2.1-37.13.

Nor could Landmark resort to common usage to determine the meaning of "divulge." While the Supreme Court of Virginia relied upon *Black's Law Dictionary* (4th ed., 1951) to support its interpretation of the word "divulge," other authorities suggest that the act of "divulging" encompasses only the first act of dis-

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or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or a well-settled common law meaning, notwithstanding an element of the degree in the definition as to which estimates might differ, . . . or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'" 269 U.S. at 391-92.

closure and not subsequent publication by the press."[56] Indeed, when the Virginia General Assembly has sought to prohibit the press from publishing other types of information, it has enacted legislation specifically addressed to the press."[57]

The Attorney General has argued that to interpret the word "divulge" any more narrowly than the Supreme Court of Virginia did would thwart the purposes of the act and "emasculate the Commission." Motion to Affirm at p. 14. As an initial matter, *amici* note that the Commonwealth has utterly failed to demonstrate that enforcement of a more narrowly construed statute—aimed at participants in Commission proceedings—would be inadequate to serve the Commonwealth's purposes. Indeed, its insistence on the need for a broad interpretation of the statute is completely undermined, *amici* submit, by the fact that similar statutes in thirty-three other jurisdictions contain no penal provisions whatsoever for the publica-

[56] At trial, counsel for Landmark relied upon *Webster's Third International Dictionary* (1961), which includes the following definition of "divulge": "to tell or make known (a secret or confidence or what had been previously unknown)." There is no suggestion that Landmark breached any confidence by publishing the article at issue in this case.

[57] Virginia Code § 53-322 provides that "[n]o newspaper or person shall print or publish the details of the execution of criminals . . . ." *Amici* rely on this statute solely to demonstrate that the Virginia General Assembly has made explicit reference to the press when it intends to prohibit publication of certain information; *amici* do not concede the statute's constitutionality.

The United States Congress has also recognized that the word "divulge" does not encompass press publication: it drafted the Communications Act of 1934, 47 U.S.C. § 605, to prohibit any person from either "divulg[ing] or publish[ing]" intercepted communications.

tion of reports concerning judicial inquiry commissions."[58] Even assuming, however, that the Commonwealth's broad interpretation of the word "divulge" would best serve the legislature's purposes, that affords no basis for rejecting Landmark's vagueness claim. It was not Landmark's obligation to sit as a court and construe the Commonwealth's penal provision in a manner that best serves the Commonwealth's purposes. It was the General Assembly's duty to embody its purposes in language sufficiently clear to give adequate notice of the statute's prohibition. And that it failed to do.

B. Overbreadth

Virginia Code § 2.1-37.13 is susceptible to such sweeping and improper application that, irrespective of its defects as applied in this case, it is void for overbreadth. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *United States* v. *Robel*, 389 U.S. 258 (1967); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940). By erecting a wall of silence regardless of the importance of the speech and regardless of whether any interest in confidentiality is thereby served, the statute runs afoul of the well-established principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of

[58] The Supreme Court of Virginia referred to thirty-four other states with statutes requiring confidentiality with respect to judicial inquiry commissions. J. S. Appendix at p. 6a; 217 Va. at 703. Of these, only the Hawaiian statute contains penal provisions prohibiting disclosure of commission proceedings.

protected freedoms." *NAACP* v. *Alabama ex rel. Flowers,* 377 U.S. 288, 307 (1964).

The boundless applications of the statute at issue are hardly an abstract, sterile proposition.[59] On its face and as construed by the Supreme Court of Virginia, this statute prohibits speech at the very core of First Amendment protection. And it does so without exception for compelling necessity or particularized need. The press is prohibited from publishing reports of Commission proceedings even if the reports are written to inform the public that the Commission had shirked its responsibilities or had been corrupted by political forces.[60]

The statute's restraint on speech is not confined to the press. It reaches broadly to each person in a chain of speakers conveying information of public importance to his neighbor, transforming each into a criminal "divulger."[61] On its face the statute even extends to potential witnesses who have been subpoenaed to give testimony, prohibiting them from consulting with counsel regarding their testimony.[62]

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[59] *Amici* have already noted some of the examples of the statute's broad scope. *See* pp. 29-32, *supra.*

[60] The history of regulatory commissions demonstrates that constant scrutiny and robust, unbridled public criticism are essential if government by commission is to flourish. See generally, Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1667 (1975).

[61] Nor are these potential applications of Virginia Code § 2.1-37.13 "whimsical and farcical straw [men]." *Baggett* v. *Bullitt,* 377 U.S. 360, 383 (1964) (Clark, J., dissenting).

[62] Virginia Code §§ 2.1-37.11 through 2.1-37.13. The extended discussion surrounding the drafting of Rule 6(e) of the Federal Rules of Criminal Procedure, the provision on grand jury secrecy, demonstrates beyond peradventure that concern over the right of a Commission witness to consult with counsel is not an "irrational imagining." As evidenced by the notes to that rule, solicitude for just such a hypothetical witness persuaded the draftsmen to exempt witnesses from the grand jury's oath of silence. See Federal Rules of Criminal Procedure, Second Preliminary Draft, Note to Rule 6; *In re Russo,* 53 F.R.D. 564, 570-71 (1971).

The statute's prohibition is so unbounded in time and scope as to approach the absurd. The citizen who today announces his intent to file a complaint against a judge is prohibited from announcing tomorrow that he has carried out his intent. And the judge who is publicly charged with misconduct is prohibited from announcing that a Commission investigation has cleared him of the charges.

Even assuming that the Commonwealth's interests would justify some restraint upon speech, it is clear, *amici* submit, that those interests cannot support the broad prohibition on speech contained in Virginia Code § 2.1-37.13. "[T]he separation of legitimate from illegitimate speech calls for more sensitive tools" than the Virginia General Assembly has supplied. *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958).[63] For this reason, Virginia Code § 2.1-37.13 must fail on overbreadth grounds.

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[63] As articulated by Chief Justice Warren in *United States* v *Robel,* 389 U.S. 258, 268 (1967):

> "[W]hen legitimate concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, [the legislature] must achieve its goal by means which have a less drastic impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less." (Citations omitted).

CONCLUSION

In the search for political, social, and economic truth, and in the legitimate governance of our democratic Republic, our constitutional faith is placed in enlightened decisionmaking by the citizenry—the ultimate sovereigns. The threats to that ideal are myriad: ignorance, apathy, suppression of novel or unpopular views, and corruption or abuse of government power. But striving to attain the ideal is itself integral to our constitutional faith, and each small triumph over threats to that ideal is a reaffirmation of our democratic strength.

The core precept of the First Amendment guarantee of "freedom of the press" is that the free and independent press occupies a protected institutional role in combatting the lurking evils that constantly threaten enlightened self-government. The press can only fulfill the lofty aspirations of that precious role through the unfettered and robust dissemination of information and ideas about government affairs. When the press pierces the veil of government secrecy or deceit to expose incompetence or corruption, the constitutional faith is that the citizenry can and will take appropriate action to bring their public servants to task. When the press reveals covert government action or illegitimate aggrandizement of official power that infringes the liberties of the people, the constitutional faith is that the citizenry can and will take prompt remedial action. When the press disseminates information about the conduct of government affairs, the constitutional faith is that public debate about that information will lead to public validation where appropriate, public repudiation or reform where necessary. To trammel the free-

dom of the press in this mission is to enslave the public. For without accurate information about government affairs to guide their decisions, the public must dwell under the tyranny of ignorance; without all information by which to evaluate public policy in the search for truth, the public must suffer under unwise and unjust policies.

Virginia Code § 2.1-37.13 imposes criminal sanctions on the press for the publication of accurate reports about governmental affairs. To call such speech a punishable "abuse" of First Amendment freedoms is to eviscerate the majestic command of that Amendment. Acceptance of any official power to criminalize such speech is to allow the government to force the press to become an unwilling partner in a conspiracy of silence that would stifle truth and relegate the public to an uninformed and dispirited condition. It is an insidious doctrine that should find no aid or comfort from this Court.

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that three printed copies of the foregoing Brief for The Washington Post Company, *et al., Amici Curiae,* were mailed, first class mail, postage prepaid, this 28th day of July, 1977 to each of the following:

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/s/ JOHN B. KUHNS
John B. Kuhns

APPENDIX

APPENDIX

CAHILL GORDON & REINDEL
EIGHTY PINE STREET
NEW YORK, N.Y. 10005

June 28, 1977

Re: Landmark Communications, Inc. v.
Commonwealth of Virginia, 76-1450

Dear Mr. Kuhns:

On behalf of Landmark Communications, Inc. I hereby consent to the filing of a brief *amicus curiae* in the above entitled matter.

Very truly yours,

/s/ FLOYD ABRAMS
Floyd Abrams

John B. Kuhns, Esq.
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1000 Hill Building
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June 23, 1977

James E. Kulp, Esquire
Assistant Attorney General
Commonwealth of Virginia
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Dear Mr. Kulp:

Pursuant to our telephone conversation, I am writing to ask your consent to our filing an *amicus* brief on behalf of a group of news media, including The Washington Post Company, in the United States Supreme Court, in *Landmark Communications* v. *Commonwealth of Virginia*, No. 76-1450. I would further request your consent to have the *amicus* brief filed no later than July 28, 1977, which is forty-five days after the Court noted probable jurisdiction on June 13, 1977.

If you do consent as requested in this letter, please indicate by signing below.

Sincerely,

/s/ JOHN B. KUHNS
John B. Kuhns

JBK:nao

June 28, 1977

On behalf of the Commonwealth of Virginia, I consent to the above.

/s/ JAMES E. KULP
James E. Kulp
Assistant Attorney General